 Customs Update

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‘Unused merchandise drawback’ offers distinct benefits for importers, exporters

Unused merchandise drawback is one of the most “trade friendly” provisions in Customs law, and the eligible international trader should take full advantage of it.

One of the reasons that it is not used to its fullest potential is that the earlier law addressing “same condition” drawback was much more restrictive than the current “unused” standard.

Simply stated, the current rule allows exporters to recover 95% of the duties, taxes and fees they have paid on imported goods that are used in the United States and subsequently exported by the importer within three years.

The greatest advantage of unused merchandise drawback is that, while the identical goods that are imported may be exported (i.e., direct unused merchandise drawback), commercially interchangeable goods may be substituted and exported as well (substitution unused merchandise drawback).

Importers should keep in mind that, in both instances, the duty-paid goods:
- Must be exported within three years from the date of importation.
- Cannot be used (i.e., no operations of assemblage or manufacture or production may be performed) in the United States.
- Must be in the exporter’s possession prior to export, and the exporting party must be the importer of the merchandise, or must have received a certificate of delivery along with the merchandise from such party.

Goods substituted for imported merchandise and exported to a North American Free Trade Agreement country (i.e., Canada or Mexico) do not qualify for substitution unused merchandise drawback.

Thus, drawback cannot be obtained in this instance.

By way of background, the drawback statute was substantively amended by the Modernization Act of 1993 (effective Dec. 8, 1993). Before this change, the “same condition” standard for substitution was fungibility.

Fungible merchandise is defined in the Customs regulations as “merchandise which for commercial purposes is identical and interchangeable in all circumstances.”

Previous phrase “same kind and quality merchandise.”

Factors considered in determining commercial interchangeability are delineated. They include, but are not limited to, governmental and recognized industry standards, part numbers, tariff classification and relative values.

Agency watches for any difference in quality

Though the “commercial interchangeability” standard is less restrictive than the former “commercially identical” standard, Customs still carefully considers the above listed factors to ensure that no difference in quality exists between the imported and exported merchandise. Notably, Customs will permit a discrepancy between the original item and its substitute where quality is not affected.

For example, the relative values of goods are often influenced by the fluctuation of market forces (i.e., supply and demand). In such cases, Customs will probably permit the discrepancy, so long as the difference in value is not a result of the change in quality of the merchandise.

If, however, one of the commercial interchangeability criteria is not met, the exporter may not be able to avail itself of substituting merchandise for drawback purposes. In addition, exporters must be aware that possession is essential for claiming substitution unused merchandise drawback.

Possession includes ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of the party claiming drawback.

The exporter must also be the importer of the merchandise on which he is claiming drawback, or must have received from the party who imported and paid any duty due on the merchandise a certificate of delivery transferring to the party the imported merchandise, commercially interchangeable merchandise or any combination of the two.

Assuming that all of the substitution unused merchandise drawback requirements are satisfied, the trade community can claim this substantial benefit on a wide variety of items, ranging from textiles and apparel to petroleum products and their chemical derivatives.

Avoid sacrificing profit to government

By importing goods produced overseas into the U.S. market, and then purchasing domestically produced goods and selling them to other foreign markets, the importer/exporter can maintain a global operation without sacrificing profit to the U.S. government in the form of duty payments.

For the savvy international trader, it’s akin to virtual duty-free shopping on a commercial scale.

Customs Update is a weekly column examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, senior partner and senior associate, respectively, in the law firm of Siegel, Mandell & Davidson PC, N.Y., and reflects the opinions of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, N.Y. 10048.